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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

DENNIS RAY BELL,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EDWARD A. MALLETT
MALLETT, TRICHTER & BRANN
3303 Main St., Ste. 300
Houston, Texas 77002
(713) 526-1778

Attorney for Dennis Ray Bell

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTION PRESENTED

WHETHER, under this Court's decision in *McCarthy v. United States,* 394 U.S. 459 (1969), a conviction must be reversed on direct appeal, where the trial court violated Rule 11(c)(1), Federal Rules of Criminal Procedure, by not personally addressing the Defendant in open court to inform him of the nature of the charges against him, and where the Defendant did not enter an oral guilty plea.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Dennis Ray Bell, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Supreme Court of Appeals for the Eleventh Circuit entered in this cause on November 21, 1985. The timely Petition for Rehearing and Rehearing *En Banc* was denied January 7, 1986.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 776 F.2d 965 and is reprinted as Appendix "A" hereto. The District Court did not issue any opinion or findings pertinent to the question presented herein.

JURISDICTION

The Opinion of the Court of Appeals was entered November 21, 1985. Petitioner's Petition for Rehearing *En Banc*, which was timely filed, was denied January 7, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fifth Amendment (Due Process Clause) provides in part:

> No person shall . . . be deprived of liberty . . . without due process of law . . .

Rule 11, Federal Rules of Criminal Procedure, provides in part:

> Before accepting a plea of guilty . . . the court must address the defendant personally in open court and inform him of and determine that he understands the following:
>
> 1) the nature of the charge to which the plea is offered. . . .

STATEMENT OF THE CASE

The sole question here relates to the Constitutional and statutory adequacy of proceedings conducted February 21, 1984, when Petitioner signed a written "Plea Agreement" to plead guilty to a two-count indictment charging conspiracies to import, (21 U.S.C. § 952(a) and § 963) and possess with the intent to distribute (21 U.S.C. § 841(a)(1), § 841(b)(6) and § 846), marihuana. The agreement is reprinted as Appendix "B." The agreement

did not explain the nature of the pending charges, did not recite the contents of the indictment, and did not apply the law to the facts. The agreement to plead guilty was expressly conditioned on Petitioner's reserving the right to appeal any pretrial orders in the case.

The pretrial order referred to was not entered until after the guilty plea was taken. Petitioner relied on the clerk's oral communication that his Motion to Dismiss was denied, and that an opinion would follow.

Prior to the hearing, Petitioner's counsel announced that counsel had just been handed the written agreement upon entering the courtroom. Counsel requested a five minute recess to discuss the agreement with Petitioner. The Petitioner was sworn and then given a five minute recess.

The Petitioner then signed the plea agreement, as did prosecution and defense attorneys, next to a printed notation "Seen and Agreed." The agreement, along with a recitation of facts by the case agent was the basis for the Court's adjudication of guilt. The plea proceedings are reprinted as Appendix "C."

The Defendant did not orally plead guilty. The only plea of guilty that occurred must be inferred from his "plea agreement" and the related proceedings. Restated below is each and every question the Court directed at Petitioner personally, and the Petitioner's response:

> THE COURT: All right, sir. Would you state your name for the record?
>
> THE DEFENDANT: Dennis Ray Bell.
>
> THE COURT: What is your address?

THE DEFENDANT: 2221 Avalon Road, Winter Garden.

THE COURT: Your age?

THE DEFENDANT: Thirty-five.

THE COURT: What is your educational background?

THE DEFENDANT: I have two credits in college.

THE COURT: What is your trade or occupation?

THE DEFENDANT: Real estate.

THE COURT: All right. I see that you have entered into a written Plea Agreement. Have you entered into this Plea Agreement freely and voluntarily after consulting with your attorneys?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: All right, sir.

Mr. Bell, I see that it is stated in here, but do you understand that by entering a plea of guilty to the counts in the Indictment that you could receive a maximum sentence of imprisonment up to five years and $15,000.00 on one count and a maximum possible imprisonment of fifteen years and $15,000.00 on the other count?

THE DEFENDANT: Yes, sir.

The Court of Appeals, affirming, approved the plea proceeding by relying on the following:

1) The Court of Appeals said the charges were "simple ones";

2) Petitioner had an opportunity to read and discuss the "plea agreement' with his attorneys;

3) Petitioner's "two credits in college" and his giving "real estate" as his trade or occupation established to the satisfaction of the Court of Appeals that Petitioner is "sophisticated" and "intelligent" and *able to understand* the charges;

4) The DEA Case Agent established a factual basis for a guilty plea, and counsel for Defendant said counsel had no contrary evidence to offer.

REASONS THE WRIT OF CERTIORARI SHOULD BE GRANTED

Petitioner submits that prior decisions of the United States Supreme Court and the Courts of Appeals, the mandatory language of Rule 11, his right to due process of law, and the supervisory duties of this Court make this an appropriate case for Supreme Court review of the procedures that must be followed under Rule 11 and the remedy for a failure to adequately follow those procedures.

Court Of Appeals Did Not Follow *McCarthy*

The Opinion of the Court of Appeals creates uncertainty about the vitality and reach of *McCarthy v. United States,* 394 U.S. 459 (1969) Petitiioner did not enter an oral guilty plea, and absolutely no inquiry was directed by the Court into the Petitioner's personal understanding of the nature of the charges. The indictment was not read. The Petitioner's responses, according to the Court of Appeals, show Petitioner has "sophistication and intelligence," and the *ability* to understand the nature of the charges, but not that the Petitioner did, in fact, understand them.

The Circuits Are In Conflict

The Court of Appeals places the Eleventh Circuit in direct conflict with every other Court of Appeals that has specifically evaluated Rule 11, both before and after the 1983 enactment of Rule 11(h). For example, in a record showing *some* colloquy about the law and facts, and an oral plea, the Fifth Circuit found fundamental, unassigned error *United States v. Corbett*, 742 F.2d 173 (5th Cir. 1984), requiring personal inquiry into the "core concerns" of Rule 11, on authority of *United States v. Dayton*, 604 F.2d 931 (5th Cir. 1979), *en banc*. Also see, *United States v. Punch*, 709 F.2d 889 (5th Cir. 1983).

Assurance Of Voluntary Guilty Pleas Is Proper Exercise Of This Court's Supervisory Powers

The *McCarthy* decision was grounded in the "due process" clause of the Fifth Amendment and the supervisory power of this Court over trial courts, a power this Court has not hesitated to exercise. *See United States v. Valez-vela-Bernal*, 458 U.S. 858, 878, n.2 (Justice O'Connor, concurring). That supervisory power requires, within the definition of voluntariness, that every defendant personally satisfy the court that he understands the essential elements of the crime charged. *See Henderson v. Morgan*, 426 U.S. 637 (1976) (Justice Rehnquist, dissenting, at 652, 653).

In This Case, Voluntariness Is Doubtful

This is a case in which the whole record will show, like in *McCarthy*, that the Petitioner could have misunderstood the nature of the charges or for other reasons was pleading involuntarily. Three illustrations from the entire Record follow, each making the wisdom of Rule 11 apparent:

1) The Court of Appeals noticed the curious fact that Petitioner was initially charged with possession, but was not indicted for possession; he entered the written agreement to plead guilty to a charge for which he had not been arraigned. *See* 776 F.2d 965, 966 n.2. The new charges had the added element of *willfulness,* not appearing in the possession charges. Compare *McCarthy,* and *United States v. Pomponio,* 429 U.S. 10 (1976) on the significance of properly considering, defining, and understanding "willfulness" when it is an element of a criminal offense.

2) Bell pleaded guilty facing back-to-back trials of him and his original attorney-of-choice for an alleged obstruction of justice," reserving as his only "benefit" from the written agreement that he could pursue his pretrial motions, and he did so without having the benefit of any findings of fact or law. The same judge had docketed both cases for trial and, of course, would sentence Petitioner on the plea or finding of guilty. The environment was inherently coercive. The almost total noncompliance with the dictates of Rule 11 and the haste toward judgment enhanced the atmosphere of compulsion.

3) Bell's Report of a Pre-Sentence Investigation shows a history of mental treatment since service in the Vietnam War. He is a 100% disabled veteran, suffers from a degenerative nerve disorder, and has been prescribed Percodan, Valium and Robossom as muscle relaxers. At times the "spirits" of famous deceased persons, such as Walt Disney and Howard Hughes, inhabit Petitioner's body.

No one knows from this almost silent record how Petitioner would have responded to the probing inquiry required by *McCarthy* and Rule 11.

Total Failure To Comply With Rule 11(c)(1) Violates Congressional Intent

Petitioner is mindful that Rule 11 and *McCarthy* have set forth no mechanical rules for determining that a Defendant is informed of and understands the nature of the charges. *But*, here, there was absolutely no inquiry whatsoever into this "core concern" of Rule 11(c)(1). As pointed out in *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977):

> ". . Congress meant to strip district courts freedom to decide *what* they must explain to a defendant who wishes to plead guilty, not to tell them how to perform this important task in the great variety of cases that would come before them."

It is the *total* failure to direct Rule 11(c)(1) inquiries at Petitioner that makes the decision of the Court of Appeals wholly contrary to the requirements of Rule 11, *McCarthy* and Congressional intent.

In *McCarthy*, 394 U.S. 459, this court indicated at 466 that:

> ". . . if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

This court, in *McCarthy*, concluded at 394 U.S. 467 that the goals of Rule 11 are undermined if the district judge relies on "assumptions" not based on recorded responses, and rejected the government's contention that

Rule 11 can be satisfied without judicial inquiry into whether the defendant understands the nature of the charges.

Efficient Judicial Administration Requires Compliance With Rule 11

The dictates of Rule 11 and the federal policy of fair and efficient judicial administration require that the reviewing court look solely to the record of the plea proceeding. *United States v. Coronado,* 554 F.2d 166 (5th Cir. 1977), at 170, n.5. Here there was no plea, no inquiry into the nature of the charges and no record of what the Petitioner understood. Under the circumstances and applicable law the trial judge should not have accepted Petitioner's plea until his understanding and voluntariness were manifestly developed for the record.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MALLETT, TRICHTER & BRANN
3303 Main St., Ste. 300
Houston, Texas 77002
(713) 526-1778

EDWARD A. MALLETT

Attorney for Petitioner
Dennis Ray Bell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit has been mailed to the United States Attorney for the Middle District of Florida, and the Solicitor General, Washington, D.C. on this the 7th day of March, 1986.

EDWARD A. MALLETT

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Dennis Ray BELL,
Defendant-Appellant.

No. 84-3344.

United States Court of Appeals,
Eleventh Circuit.

Nov. 21, 1985.

Pursuant to his guilty plea defendant was convicted in the United States District Court for the Middle District of Florida, George Kendall Sharp, J., of conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute, and he appealed. The Court of Appeals held that: (1) trial court, in accepting defendant's guilty plea, did not fail to establish the defendant's understanding of the nature of the charges in violation of Rule 11; (2) defendant had no reasonable expectation of privacy as to the confidentiality of meetings with his attorney and two cooperating defendants and therefore the Government's monitoring of the meetings did not interfere with the defendant's attorney-client relationship in violation of Sixth Amendment; and (3) even assuming that government improperly interfered with attorney-client relationship, dismissal of indictment was inappropriate where defendant suffered no adverse impact as a result of the alleged Sixth Amendment violation.

Affirmed.

Edward A. Mallett, Houston, Tex., for defendant-appellant.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and JOHNSON, Circuit Judges, and HOFFMAN*, District Judge.

PER CURIAM:

Dennis Ray Bell was convicted of conspiracy to import marijuana in violation of 21 U.S.C. §§ 952(a), 963 (1982) and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841 (b)(6), 846 (1982) after pleading guilty to these offenses. In this direct appeal, Bell complains of the trial court's failure to comply with Fed. R. Crim. P. 11(c)(1) in accepting Bell's guilty plea, the denial of Bell's motion to dismiss the indictment, the denial of various post-trial motions, and the eight year prison sentence Bell received. We disagree with Bell's allegations of error and find that the conviction and sentence should stand.

I. FACTS

Norman Weir and Charles Kuylen were arrested on June 29, 1983 for conspiracy to import and distribute marijuana.[1] Their arrest was kept secret because they immediately became "confidential informants." As confidential informants, Weir and Kuylen agreed to cooperate

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* Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

1. Weir and Kuylen's arrest was the product of an undercover investigation, by the Government, of drug smuggling activity by Weir, Kuylen, Bell and others.

with the Drug Enforcement Agency (the "DEA") and Agent Stephen Collins in the investigation of Bell and others involved in two marijuana conspiracies.

Bell was subsequently arrested on July 8, 1983, and charged by complaint with possession with intent to distribute a quantity of marijuana.[2] Following Bell's arrest, his attorney Joel Dick met with Agent Collins on at least two separate occasions. During these meetings they discussed the charges against Bell that would be contained in the indictment, the fact that the indictment would be sealed for thirty days, and the possibility that Bell might provide the Government with information in exchange for a reduction or a dismissal of charges. Collins indicated that sealing the indictment would provide Bell with time to covertly cooperate with the Government should he decide to do so. Collins also informed Dick that Weir and Kuylen would be named as co-defendants in the indictment. Bell, Weir and Kuylen were indicted on July 13, 1983 for conspiracy to import and for conspiracy to possess and distribute marijuana. The indictment was sealed at the Government's request.

Thereafter, Bell approached Weir and Kuylen to inform them that they would be arrested in the near future.[3] Bell suggested that Weir and Kuylen join him for a meeting scheduled with his attorney, Joel Dick, to decide what course of action the three should take. This meeting took place on July 14, 1983 and was recorded in its entirety

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2. Curiously enough, Bell was never indicted for this charge. *See infra* p. 967.

3. At this time, Bell was unaware of Weir and Kuylen's earlier arrest on June 29, 1983.

by the Government.[4] During the meeting, the three co-defendants discussed the type of information they might provide to the Government during plea negotiations. The question of whether Dick would represent Weir and Kuylen was also discussed, but remained unsettled at the conclusion of the meeting.[5]

On July 28, 1983, Bell, Weir and Kuylen met with Dick a second time to discuss the charges pending against them. This meeting was also recorded by the Government. During this meeting Dick recommended that Weir and Kuylen take a trip to Belize. The motive underlying Dick's suggestion was disputed by the parties[6] and became the focus of a separate complaint charging Dick and Bell with obstruction of justice. References to Weir and Kuylen's retention of another attorney were also made during this meeting.

Later that morning, Bell and Dick attended the scheduled arraignment where they first learned that the indictment had been unsealed and that the indictment also named Weir and Kuylen. Thereafter, Dick and Bell were

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4. The Government's motive for recording the conversation is disputed by the parties. The Government contends that Agent Collins' decision was based upon a concern for the safety of the informants and a concern that Weir and Kuylen might be offered some inducement not to testify against Bell or not to cooperate with the Government in its investigation. Bell argues that the Government's rationale is not credible.

5. The following day, however, Weir called Bell and indicated that he and Kuylen would probably be unable to retain Dick for financial reasons.

6. Dick and Bell contended that they suggested the trip to Belize as a means of obtaining money to assist their defense and information that might be used in plea negotiations. The Government claimed that Dick and Bell hoped Weir and Kuylen's departure would result in a dismissal of the pending charges.

arrested and charged by complaint with obstruction of justice.

II. DISPOSITION BELOW

Bell filed numerous pre-trial motions in this case including a motion to dismiss the indictment. A hearing on several of the motions, including the motion to dismiss, was held January 31, 1984 before G. Kendall Sharp, United States District Judge for the Middle District of Florida. These motions were denied.

On February 21, 1984, Bell entered into a written plea agreement in which he agreed to enter a conditional[7] plea of guilty to both counts in the indictment in the marijuana case. That same day, Judge Sharp presided over jury selection in the obstruction case.

One week later, on February 27, 1984, a jury trial in the obstruction case commenced before Richard B. Kellam, Senior District Judge for the Eastern District of Virginia.[8] On February 29, 1984 the jury found Bell not guilty of either obstruction count. Subsequently, Bell moved to transfer his renewed motion to dismiss and to transfer his sentencing hearing from Judge Sharp to Judge Kellam. In support of this motion, Bell argued that Judge Kellam was in the best position to reconsider the motion to dismiss in that he presided at Bell's obstruction of justice trial. Judge Sharp denied the motion.

On April 4, 1984 Bell filed a motion to postpone sentencing pending receipt of transcripts in the obstruction

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7. The plea was taken with the express understanding that Bell would have the right to appeal the denial of any pre-trial orders in the case.

8. There was neither notice nor explanation of the transfer of proceedings nor was any objection taken.

of justice case and a motion to supplement the record in this case with the record from the obstruction of justice trial. Judge Sharp rescheduled the sentencing hearing for May 21, 1984 and granted the motion to supplement the record. A second motion to continue sentencing pending completion of the statement of facts was denied.

On May 21, 1984, Judge Sharp sentenced Bell to a period of incarceration of eight years and revoked his bond.

III. ARGUMENTS ON APPEAL

Bell raises the following points of error at the trial court level. First, Bell claims that there was a complete failure by the trial court to address a core concern of Fed. R. Crim. P. 11 when it accepted Bell's guilty plea. Bell argues that this failure to comply with Rule 11 requires that his guilty plea be set aside and the case remanded for another hearing at which he may plead anew. Second, Bell argues that the trial court erred when it denied the motion to dismiss. Third, Bell claims that the eight year sentence was improperly imposed because, among other things, the trial court failed to comply with Fed. R. Crim. P. 32. Bell argues that the mandatory language of the rule requires that the sentence be vacated. Finally, Bell claims that the trial court erred by denying his request to transfer his motion to dismiss and his sentencing to Judge Kellam and by denying his second motion to continue sentencing. After considering Bell's third and fourth claims of error, we find that they are without merit and warrant no further discussion. We consider the remaining two issues below.

IV. DISCUSSION

A. Rule 11.

[1] In *United States v. Dayton*,[9] 604 F.2d 931, 934 (5th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 904, 100 S. Ct. 1080, 63 L.Ed.2d 320 (1980), this court's predecessor made a "clear and definitive statement of how trial courts should conduct guilty plea hearings." *Dayton* recognized that three core concerns underlie Rule 11: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know the consequences of his plea. 604 F.2d at 939. A court's failure to address any one of these three core concerns requires automatic reversal. *Id.* (citing *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L.Ed.2d 418 (1969)).

In this appeal, Bell claims that the district court "complete[ly]" failed to establish that he understood the nature of the charges against him. He argues that this failure requires automatic reversal and entitles him to replead. We disagree with Bell's assertion that the district court completely failed to establish Bell's understanding of the nature of the charges and find no violation of Rule 11.

[2] It is well established that the nature of the inquiry required by Rule 11 will vary from case to case. *McCarthy*, 394 U.S. at 467 n. 20, 89 S. Ct. 1166, 1171 n. 20. Courts have declined to set forth a simple or mechanical rule for determining whether or not a defendant is informed of and understands the nature of the charges against him. *Dayton*, 604 F.2d at 937-938. *See also*

9. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) we adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

McCarthy, 394 U.S. at 467 n. 20, 89 S. Ct. 1166, 1171 n. 20. Instead, this inquiry is committed to "the good judgment of the court, [and] to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence." *Dayton*, 604 F.2d at 938 (footnote omitted).

[3] In the present case, Bell had the benefit of a written plea agreement which clearly and concisely set forth the charges.[10] The charges to which Bell pled guilty were "simple" ones. *Accord Dayton*, 604 F.2d at 942 (possession of marijuana with intent to distribute found to be "simple charge"). Before accepting the guilty plea, the district court, at Bell's request, granted a recess to afford Bell the opportunity to read and to discuss the plea agreement with the three attorneys representing him at the hearing. Upon reconvening, after the recess, the court proceeded to inquire into Bell's educational and professional background:

> THE COURT: What is your educational background?
>
> THE DEFENDANT: I have two credits in college.
>
> THE COURT: What is your trade or occupation?
>
> THE DEFENDANT: Real estate.

Through this inquiry, we are satisfied that the district court established that Bell was a sophisticated and intelli-

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10. The plea agreement stated: "Count One of the Indictment charges conspiracy to import marihuana in violation of Title 21, United States Code, Sections 952(a) and 963. . . . Count Two of the Indictment charges conspiracy to possess with the intent to distribute in excess of 1,000 pounds of marihuana in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6) and 846."

gent person who was fully able to understand the nature of the charges against him.[11] The court then moved on to inquire into the remaining two "core concern" areas of Rule 11.[12]

After this colloquy between the court, Bell, and his counsel, the Government presented a factual basis for the guilty plea by calling Agent Collins to testify.[13]

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11. In determining the scope of the inquiry needed to apprise a defendant of the nature of the charges against him, the court is entitled to take into account the defendant's sophistication and intelligence. *Dayton*, 604 F.2d at 938. When the court relies on the defendant's sophistication and intelligence, however, it is "advisable to get it on the record by questioning him." *Id.* at n.11. This is precisely what the district court did in the present case.

12. We reproduce below relevant excerpts from the transcript of the Rule 11 proceeding:

> THE COURT: Have you entered into this Plea Agreement freely and voluntarily after consulting with your attorneys?
> DEFENDANT: Yes, sir.
>
> * * *
>
> THE COURT: Mr. Bell, I see that it is stated in here, but do you understand that by entering a plea of guilty to the counts in the Indictment that you could receive a maximum sentence of imprisonment up to five years and $15,000.00 on one count and the maximum possible imprisonment of fifteen years and $15,000.00 on the other count?
> DEFENDANT: Yes, sir.

13. Agent Collins' recitation of the facts is reproduced below in full:

> THE GOVERNMENT: Did you have occasion to instigate an investigation into the activities of Dennis Ray Bell and his activities involving the importation of marijuana into this country?
> AGENT COLLINS: Yes, I did, through a cooperating individual who was introduced to two members who were working along with Mr. Bell, Mr. Charles Kuylen and Mr. Norman Weir, who were seeking to smuggle approximately fifteen hundred pounds of marijuana from the country of Belize into the United States. I was introduced to the two other Co-defendants in the case, to obtain for them a pilot and aircraft to bring the marijuana into the United States.

Thereafter, in commenting upon Agent Collins' recitation of the facts, Bell's attorney stated:

> I believe that recitation is exactly what the Government would offer as proof in this case, that it would support a conviction for conspiracy to import mari-

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I did subsequently have several meetings with Weir and Kuylen and telephone conversation with Mr. Bell regarding the problems that would occur in sending a plane and pilot to Belize and bring the marijuana back to the United States. Arrangements were made for an undercover agent, DEA agent, to act as the pilot who brought a plane up here, showed two other members of the organization, Mr. Weir and Mr. Kuylen, the airplane and its capabilities. Negotiations broke down toward the end of May due to the fact that there were military exercises being conducted in the country of Belize and individuals involved thought it would not be safe to take the plane down there and bring the marijuana into the United States.

THE GOVERNMENT: Did you have a conversation with Mr. Bell on or about May 25th regarding the importation of marijuana?

AGENT COLLINS: Yes, I did.

THE GOVERNMENT: During that conversation what did Mr. Bell state to you?

AGENT COLLINS: He was very upset due to the fact that he had invested $200,000.00 in this operation and I could not give him a definite date when he could send the DEA undercover pilot and the plane to the country of Belize. They were in a hurry to get the marijuana here due to the fact that the season was about to end down there and there wouldn't be any left.

THE GOVERNMENT: On or about May 29th did you meet with Mr. Weir at the Orlando Airport regarding this conspiracy?

AGENT COLLINS: Yes, I did. I met with Mr. Weir. We had gone ahead and made arrangements to send the pilot and the plane to Belize. In fact, what we were going to do was when Mr. Weir showed up with the money to pay the pilot, we were going to arrest him, Mr. Bell and Mr. Kuylen. However, that was cancelled due to the fact that when I got to the airport Weir advised me that there were again military exercises being conducted that particular weekend in Belize and, therefore, we could not send the plane and the pilot.

THE GOVERNMENT: After that time did there come a time when you and other agents determined that it would not be safe to send a pilot to Belize?

juana and a conviction for conspiracy to possess marijuana with the intent to distribute it, and we have no evidence to offer contrary to the proffered testimony by the Government.

The district court then accepted Bell's guilty plea.

AGENT COLLINS: Yes. There are only a couple DEA agents stationed in that area of Central America. If we sent the pilot and plane down there we could not recover it safely. Additionally, we would have to notify the Government of Belize, which would possibly cause some problems and jeopardize the safety of the agents down there.

THE GOVERNMENT: What decision, if any, did you make regarding the continuation of your investigation into those activities?

AGENT COLLINS: Due to the fact that all the individuals, Mr. Bell, Mr. Weir and Mr. Kuylen, had already approached us about bringing marijuana into the United States, we changed the course of the investigation in June to where we would offer them a two thousand pound load of marijuana.

THE GOVERNMENT: Did you in fact meet with Mr. Weir and Mr. Kuylen on or about June 8th regarding that transaction?

AGENT COLLINS: Yes, I did.

THE GOVERNMENT: Would you tell the Court what transpired at that meeting?

AGENT COLLINS: Basically advised them that we had two thousand pounds of marijuana for sale and that the price of the marijuana would be roughly $245.00 per pound. We were requesting that they pay us for a thousand pounds in cash, and we would go ahead and front their group the other thousand pounds of the marijuana.

Mr. Weir stated that he could not speak for himself but would have to get back to Mr. Bell, who was in charge of the operation at that particular time.

THE GOVERNMENT: During the period June 14th through June 28th, did the individuals involved, that is, Mr. Weir, Mr. Kuylen and Mr. Bell, have any difficulty in raising the amount of money that you discussed?

AGENT COLLINS: Apparently so. I was instructed when I was undercover with Weir and Kuylen that the main buyer was somewhat in an underground, quote unquote status and could not be reached. Subsequently, further investigation we did flash and give to Mr. Weir—showed him two thousand pounds of marijuana. We gave him a bale containing about forty to forty-

In reaching our decision on the Rule 11 issue, we have given close attention to the facts of this case. As outlined above, we are presented with a situation where the charges were simple; the defendant, a sophisticated and intelligent person, was represented by three attorneys; and, finally, the defendant was given ample opportuniity to discuss the charges and to read the written plea agreement during the proceeding. This case is unlike *McCarthy* where the Supreme Court was able to point out several specific, "conceivable" ways in which the defendant may have misunderstood the elements of the crime with which he was

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five pounds of marijuana to take to his broker, who was Mr. Bell in this case.

THE GOVERNMENT: Did he in fact take that bale to Mr. Bell?

AGENT COLLINS: Yes, he did, took it to his residence.

THE GOVERNMENT: Was that on or about June 29th?

AGENT COLLINS: Yes, it was.

THE GOVERNMENT: And from June 29th until July 8th, did—excuse me, June 29th were Mr. Weir and Mr. Kuylen placed under arrest?

AGENT COLLINS: Yes, during the process of giving Mr. Weir the bale he discovered our surveillance. He was subsequently arrested the following day, immediately agreed to cooperate, along with Mr. Kuylen. They instructed me that they had taken the bale of marijuana to Mr. Bell's residence, where he would act as a broker and show it to the particular buyer involved in this case.

For the next week Weir made several telephone calls to Mr. Bell, which were recorded by our office. I had several meetings with Mr. Bell. I subsequently was introduced to Mr. Bell in person, at which time Bell explained to me that he had no idea where the buyer was at this particular time but once he did get back in touch with him the deal would go through.

THE GOVERNMENT: On July 28th did you have occasion to arrest Mr. Bell?

AGENT COLLINS: On July the 8th.

THE GOVERNMENT: Excuse me, July 8th.

AGENT COLLINS: Yes, executed a search warrant at the residence of Mr. Bell, retrieved and recovered the bale of marijuana and arrested Mr. Bell at that time.

charged. *See McCarthy,* 394 U.S. at 471, 89 S. Ct. 1166, 1173; *see also, Dayton,* 604 F.2d at 936. In the present case, there is no conceivable way that Bell could have misunderstood the nature of the charges involved.

Admittedly, it would have been preferable for the district court to have read the indictment to Bell and thereafter given him the opportunity to ask questions about the indictment. *See Dayton,* 604 F.2d at 938. However, in this instance, to permit Bell to replead would be to raise form over substance. It is established that when reviewing a Rule 11 proceeding, " '[m]atters of reality, and not mere ritual, should be controlling.' " *McCarthy,* 394 U.S. at 468 n. 20, 89 S. Ct. at 1171 n. 20 (quoting *Kennedy v. United States,* 397 F.2d 16, 17 (6th Cir. 1968), *cert. denied,* 394 U.S. 1018, 89 S. Ct. 1636, 23 L.Ed.2d 43 (1969)). Consequently, based on the facts of this case, we find no violation of Rule 11.

B. Denial of the Motion to Dismiss the Indictment.

Bell also contends that the district court erred by denying his motion to dismiss. In support of this motion, Bell argues that the Government improperly interferred with the attorney-client relationship, in violation of the sixth amendment, by monitoring the meetings with his attorney, Joel Dick, and the two cooperating defendants, Weir and Kuylen. This unlawful intrusion, Bell claims, warrants dismissal of the indictment. We disagree.

It is undisputed that the standard enunciated in *United States v. Melvin,* 650 F.2d 641 (5th Cir. Unit B 1981)[14]

14. In *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir. 1982) we adopted as precedent decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981.

is applicable to the present case to determine whether the Government unlawfully interfered with the attorney-client relationship of Bell and Dick. In *Melvin,* the court stated that a communication is protected by the attorney-client privilege and protected from Government intrusion by the sixth amendment if it is (1) intended to remain confidential *and* (2) under the circumstances was *reasonably* expected and understood to be confidential. *Id* at 645. Thus the relevant inquiry is not whether Bell expected his discussion with Dick, Weir and Kuylen to remain confidential, but rather, whether his expectation was reasonable.

[4] The district court made explicit findings of fact on the question of the reasonableness of Bell's expectation of confidentiality at these meetings. The relevant facts are set forth below:

> The facts indicate that after Dick's initial contact with Agent Collins on behalf of his client, Dick advised Bell of the impending indictments against Bell, Weir and Kuylen. Bell, whether on his own initiative or at Dick's urging, contacted Weir and Kuylen and suggested they meet. It is unclear whether Dick sought to represent all three for their collective benefit or merely to elicit from Weir and Kuylen any useful information he could extract from them while they were not accompanied by their attorney. At their meeting on July 14, 1983, neither attorney Dick nor his client, defendant Bell, inquired about Weir and Kuylen's arrangements for representation until the conversation was more than half concluded. Bell and Dick may have desired Weir and Kuylen's assistance, or hoped that Weir and Kuylen would acquiesce to a suggestion of the advantages of a common defense based upon Mr. Dick's legal experience and reputation; however, no inquiry was made to

> determine if Weir and Kuylen would also retain Mr. Dick as their counsel until much of the conversation about unrelated tangential criminal matters had been discussed among the four of them.
>
> *Until this point, neither Dick's nor or [sic] Bell's expectation that their conversation with Weir and Kuylen would remain confidential was reasonable. Thereafter, when Weir and Kuylen did not agree to become confederates for purposes of their collective defense, but merely suggested they were looking into other representation, Dick and Bell chose to continue further discussion at their peril.*

United States v. Bell, No. 83-83-CR-ORL-18, slip op. at 6-7 (M.D. Fla. Feb. 23, 1984) (emphasis added).

The standard of review to be applied to the district court's factual findings is the "clearly erroneous" standard. *See United States v. Penn,* 721 F.2d 762, 765 (11th Cir. 1983) (it is generally agreed that in criminal cases the clearly erroneous standard should be applied to factual findings on matters other than guilt). After examining the record and the facts as set forth by the district court we hold that the district court's determination that Bell's expectation of privacy was unreasonable was not clearly erroneous. It was clear from the initial meeting between Bell, Dick, Weir and Kuylen that Weir and Kuylen had not yet retained Dick.[15] Moreover, the next day, Weir indicated to Bell that he and Kuylen would probably be unable to retain Dick for financial reasons.[16] During the

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15. Halfway through the initial meeting Dick inquired as to Weir and Kuylen's legal representation:

DICK: You guys want me to represent you?

WEIR: Uh, yeah, we'll talk that over and get back with you.

16. In a telephone conversation, Weir said to Bell "Ah, listen, I don't know if we can afford Joel, right, Charles and I."

second meeting with Bell and Dick, Weir and Kuylen clearly stated that they had retained another attorney to represent them. Nevertheless, Dick and Bell continued to discuss a defense strategy with Weir and Kuylen. Given these facts, we cannot say that the district court's findings were "clearly erroneous" with respect to Bell's expectations of confidentiality. As our predecessor court has held "[t]here is no confidentiality when disclosures are made in the presence of a person who has not joined the defense team, and with respect to whom there is no reasonable expectation of confidentiality." *Melvin,* 650 F.2d at 646 (emphasis deleted).[17]

[5] Even assuming, for the sake of argument, that there was a violation of Bell's sixth amendment right to counsel, dismissal of the indictment would still be inappropriate absent demonstrable prejudice to the defendant. *United States v. Morrison,* 449 U.S. 361, 365, 101 S. Ct. 665, 668, 66 L.Ed.2d 564 (1981). Thus for example, dismissal of an indictment was inappropriate where the motion was based solely upon the egregious behavior of the agents. *Id.* at 363, 101 S. Ct. at 667. *See also Melvin,* 650 F.2d at 643 (in *Morrison* the Supreme Court held

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17. Regarding facts substantially similar to those in this case, the court in *United States v. Melvin* held:

> [T]here is no governmental intrusion into the attorney-client relationship in violation of the Sixth Amendment when a confidential informant attends a meeting of other defendants and their counsel, at the request of other defendants and their attorneys, under such circumstances that the informant could not reasonably refuse to attend without jeopardizing his undercover status, and under circumstances indicating that the other defendants and their counsel knew or should have known that the informant was not part of the defense team and knew or should have known that there was no reasonable expectation of confidentiality in the presence of the informant.

650 F.2d at 646 (emphasis deleted).

that "there is no *per se* rule requiring dismissal of the indictment as the sanction for intrusion into the attorney-client relationship by government agents"). Moreover, even where the violation is *deliberate,* dismissal of the indictment as the sanction for governmental intrusion into the attorney-client relationship is inappropriate, absent prejudice. *Morrison,* 449 U.S. at 365, 101 S. Ct. at 668. "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation. . . ." *Morrison,* 449 U.S. at 364, 101 S. Ct. at 667. The proper approach is to identify and then neutralize the taint by suppressing the evidence or by ordering a new trial if the evidence has already been wrongfully admitted. *Id.* at 365, 101 S. Ct. at 668.

The district court specifically found that Bell's case was not prejudiced by Agent Collins' actions. *United States v. Bell,* No. 83-83-CR-ORL-18, slip op. at 7-8 (M.D. Fla. Feb. 23, 1984). We hold that the district court's finding of no prejudice to Bell's case is not clearly erroneous. First, the incriminating taped evidence was obtained *after* the institution of adversary proceedings.[18] The indictment against Bell, therefore, was not based on information gathered by recording Bell's meetings with his attorney. *Id.*, slip op. at 7. Second, the Government indicated that it would not introduce the recording of the July 14, 1983 conversation in the marijuana case. *Id.* Therefore, although we do not condone Agent Collins' behavior, we conclude that because Bell suffered no ad-

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18. *See, e.g., Morrison,* 449 U.S. at 365, 101 S. Ct. at 668 (citations omitted) (when information is improperly obtained before trial but after the institution of adversary proceedings, the remedy characteristically imposed is not dismissal of the indictment).

verse impact as a result of the alleged sixth amendment violation, dismissal of the indictment is an inappropriate remedy.

[6] In support of the motion to dismiss, Bell also contends that the Government, through a "promise" to his attorney to seal the indictment in the marijuana case for thirty days, caused such "substantial performance" by him that the Government should be estopped from denying the existence of a binding contract to dismiss this criminal prosecution. Therefore, Bell argues, dismissal is the only remedy that vindicates his due process rights.

In making this argument Bell relies, in part, on *Santobello v. New York,* 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971). Bell's reliance on that case is misguided. *Santobello* held that a defendant's due process rights were violated when the prosecutor, contrary to the terms of a previously negotiated plea agreement between the defendant and the state, recommended to the judge that the maximum sentence be imposed. Integral to the Court's decision was the fact that the defendant entered his guilty plea *on condition that* the prosecutor make no recommendation as to a sentence. *Id.* at 262, 92 S. Ct. at 498. Under those circumstances, the Court held "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* Unlike the defendant in *Santobello,* Bell did not plead guilty in reliance on any promises made by the Government. The District Court established that Bell's plea was entered without reliance on any "promises or inducements," other than those contained in the written plea agreement.

Moreover, Bell's reliance on the principle of "scrupulous fairness" in plea bargain negotiations, as enunciated in *Johnson v. Mabry*, 707 F.2d 323, 330 (8th Cir. 1983), *rev'd*, ____U.S.____, 104 S. Ct. 2543, 81 L.Ed.2d 437 (1984) is also misplaced. In reversing the Eighth Circuit's decision in *Mabry*, the Supreme Court stated "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." ____U.S. at ____, 104 S. Ct. at 2546 (footnote omitted). In *Mabry*, the prosecutor withdrew an offer of a plea bargain *after* the defendant had communicated his acceptance of that offer but *before* the defendant had entered his guilty plea with the court. Ultimately, the defendant did plead guilty to a second offer made by the prosecutor. Finding that the defendant's due process rights had not been violated, the Supreme Court stated "[i]t is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired." *Id.* at ____, 104 S. Ct. at 2547. *See also Spann v. Wainright*, 742 F.2d 606 (11th Cir. 1984) (a defendant's mere acceptance of a prosecutor's proposed plea bargain does not create a due process right to have the bargain specifically enforced). Insofar as Bell does not dispute the voluntary nature of his guilty plea, we conclude that the denial of the motion to dismiss was proper.

For the foregoing reasons, Bell's conviction and sentence are

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NO. 83-83-Cr-Orl-17

UNITED STATES OF AMERICA

v.

DENNIS RAY BELL

(Filed February 21, 1984)

PLEA AGREEMENT

It is the understanding of the Government that, pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure, the defendant Dennis Ray Bell will at this time enter a conditional plea of guilty to Counts One and Two of the Indictment which was returned by a Federal Grand Jury in the Middle District of Florida in July, 1983, and superseded by the Grand Jury in October, 1983. Count One of the Indictment charges conspiracy to import marihuana in violation of Title 21, United States Code, Sections 952(a) and 963. This offense is a felony which carries a maximum possible punishment of imprisonment for a term of five (5) years and/or a fine of $15,000. Count Two of the Indictment charges conspiracy to possess with the intent to distribute in excess of 1,000 pounds of marihuana in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6) and 846.

This offense is a felony which carries a maximum possible punishment of imprisonment for a term of fifteen (15) years and/or fine of $15,000.

Rule 11(a)(2), Federal Rules of Criminal Procedure, provides:

> With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

The Government hereby consents to the conditional entry of a plea in this case and to the reservation by the defendant, of his right to appeal this Court's denial of his Motion to Dismiss Indictment filed December 14, 1983 and supplemented February 6, 1984, in which defendant alleges violations of his right to the effective assistance of counsel and due process rights.

The United States makes no promises or assurances with respect to any sentence to be imposed by the Court. The defendant understands that the Court could impose the maximum term of imprisonment of five (5) years and/or $15,000 for Count One of the Indictment, and fifteen (15) years and/or $15,000 for Count Two of the Indictment, or any lesser sentence, including probation, which is in the discretion of the Court.

This is the full and complete understanding of the parties.

The defendant recognizes that under the Constitution he is presumed innocent and the United States of America

has the burden of proving beyond a reasonable doubt the charges alleged in the Indictment to which he is pleading guilty. The defendant recognizes that he has the right to a jury trial and by pleading guilty he gives up that right. The defendant recognizes that he has the right to remain silent as well as the right to testify in his own behalf and to use the compulsory process of the Court to call witnesses in his defense. Further, the defendant recognizes that he has the right to confront and cross-examine his accusors in a public trial and have the assistance of legal counsel. Being fully aware of these rights, the defendant waives such rights.

The defendant hereby states that he has had full opportunity to discuss this case with his attorneys, and has been made aware of all of his rights. The defendant further states that he is satisfied with the representation of his attorneys.

The defendant knows of no physical or mental disabilities which would prevent him from understanding the nature of this proceeding against him or which would impair his ability to assist his counsel in his behalf.

The defendant understands that his plea of guilty shall be presented to the Court and filed in open Court for the purpose of entering this conditional plea of guilty. By affixing their signatures to this document, the defendant and counsel for the defendant, hereby acknowledge that no other promises, arrangements, agreements, or inducements exist for this plea agreement, other than those set forth hereinabove.

Respectfully submitted,

ROBERT W. MERKLE
United States Attorney

By /s/ STEPHEN L. PURCELL
Stephen L. Purcell
Assistant United States Attorney

By /s/ THOMAS W. TURNER
Thomas W. Turner
Managing Assistant U.S. Attorney
501 Federal Building
80 North Hughey Avenue
Orlando, Florida 32801
305/420-6341

SEEN AND AGREED:

/s/ DENNIS RAY BELL
Dennis Ray Bell
Defendant

/s/ MARC L. LUBET
Marc L. Lubet

/s/ S. A. GUIBERSON
S. A. Guiberson

/s/ EDWARD A. MALLETT
Edward A. Mallett

/s/ GARY TRICHTER
Gary Trichter

Attorneys for Defendant

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 83-83-Orl-Cr-18

UNITED STATES OF AMERICA

v.

DENNIS RAY BELL,
Defendant.

Orlando, Florida

February 21, 1984

APPEARANCES

STEPHEN PURCELL, ESQUIRE
Assistant United States Attorney
80 North Hughey Avenue
Orlando, Florida 32801

Appearing on behalf of the Government.

EDWARD A. MALLETT, ESQUIRE
3303 Main, Suite 300
Houston, Texas 77002

S. A. GUIBERSON, ESQUIRE
2211 Norfolk, Suite 810
Houston, Texas 77098

MARC LUBET, ESQUIRE
1520 Hartford Building
Orlando, Florida 32801

Appearing on behalf of the Defendant.

CHANGE OF PLEA

TRANSCRIPT OF PROCEEDINGS HAD AND TESTIMONY TAKEN in the Change of Plea Hearing in the above-styled case, held on TUESDAY, FEBRUARY 21, 1984, in the United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida, before the Honorable G. Kendall Sharp.

THE COURT: Case 83-83, Criminal, Orlando, United States of America versus Dennis Bell. Would you come forward, please, and state your name for the record?

MR. PURCELL: Stephen Purcell for the Government, Your Honor.

MR. MALLETT: For the record, I am Edward Mallett. I am here with Mr. Bell. Also with me is co-counsel and local counsel, Marc Lubet and Mr. Samuel Guiberson. We are all present this morning.

I want to advise the Court with an apology, if I may, that because of the time situation we were in and yesterday being a holiday, I was not presented the formal written Plea Agreement that we have entered into over the telephone until immediately before entering Court. I think that the proceedings will go more smoothly if I can have about five minutes to discuss it with Mr. Bell before we proceed.

THE COURT: All right. That's fine.

MR. MALLETT: It was just handed to us as we came in and as the Court called its docket. I apologize.

THE COURT: Swear the witness, and then we will take a five minute recess.

THE CLERK: Do you solemnly swear that the testimony you are about to give in the case now before the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: I do.

THE COURT: All right, you can go outside for five minutes.

(Short recess.)

MR. MALLETT: Your Honor, I believe we are ready to proceed, and I apologize for the delay.

THE COURT: I believe Mr. Bell has already been sworn; is that correct?

MR. MALLETT: Yes, Your Honor.

THE COURT: All right, sir. Would you state your name for the record?

THE DEFENDANT: Dennis Ray Bell.

THE COURT: What is your address?

THE DEFENDANT: 2221 Avalon Road, Winter Garden.

THE COURT: Your age?

THE DEFENDANT: Thirty-five.

THE COURT: What is your educational background?

THE DEFENDANT: I have two credits in college.

THE COURT: What is your trade or occupation?

THE DEFENDANT: Real estate.

THE COURT: All right. I see that you have entered into a written Plea Agreement. Have you entered into this Plea Agreement freely and voluntarily after consulting with you attorneys?

THE DEFENDANT: Yes, sir.

THE COURT: Have you—other than anything contained in the written Plea Agreement, have you received any threats or promises or inducements to enter into this Agreement?

MR. LUBET: Your Honor, there is one additional matter to the Plea Agreement and that is that the Government will not object to the Defendant remaining on the same conditions of release during an appeal which will be forthcoming from this matter after the sentencing.

THE COURT: All right. Well, the Court will not go along with that, then.

MR. LUBET: The Court will not go along with that?

THE COURT: No.

MR. LUBET: Well—

MR. MALLETT: Perhaps we should have a moment to confer, Your Honor.

THE COURT: All right, sir.

(Pause.)

MR. MALLETT: Your Honor, that is not part of our written Plea Agreement, and Mr. Bell understands that it is not part of his agreement with the Government, that the Government will not move for an increase in bail or modification of conditions of release at time of

sentencing and in connection with our agreement this morning it will be limited to what is within the four corners of the instrument entitled Plea Agreement.

THE COURT: All right, sir.

Mr. Bell, I see that it is stated in here, but do you understand that by entering a plea of guilty to the counts in the Indictment that you could receive a maximum sentence of imprisonment up to five years and $15,000.00 on one count and a maximum possible imprisonment of fifteen years and $15,000.00 on the other count?

THE DEFENDANT: Yes, sir.

THE COURT: Does the Government wish to add anything to the factual basis upon which this—

MR. PURCELL: Yes, Your Honor, I would call Agent Steve Collins to provide a factual basis for the Plea Agreement.

THE CLERK: Do you solemnly swear that the testimony you are about to give in this cause now before the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I will.

STEPHEN COLLINS,

called as a witness on behalf of the Government, testified as follows:

DIRECT EXAMINATION

BY MR. PURCELL:

Q. Agent Collins, would you please state your full name for the record?

A. Stephen, S-t-e-p-h-e-n Collins, C-o-l-l-i-n-s.

Q. And where are you employed?

A. Task Force Agent with the Drug Enforcement Administration, Orlando, Florida.

Q. Were you employed in May, 1983?

A. Yes, I was.

Q. Did you have occasion to instigate an investigation into the activities of Dennis Ray Bell and his activities involving the importation of marijuana into this country?

A. Yes, I did, through a cooperating individual who was introduced to two members who were working along with Mr. Bell, Mr. Charles Kuylen and Mr. Norman Weir, who were seeking to smuggle approximately fifteen hundred pounds of marijuana from the country of Belize into the United States. I was introduced to the two other Co-defendants in the case, to obtain for them a pilot and aircraft to bring the marijuana into the United States.

I did subsequently have several meetings with Weir and Kuylen and telephone conversation with Mr. Bell regarding the problems that would occur in sending a plane and pilot to Belize and bring the marijuana back to the United States. Arrangements were made for an undercover agent, DEA agent, to act as the pilot who brought a plane up here, showed two other members of the organization, Mr. Weir and Mr. Kuylen, the airplane and its capabilities. Negotiations broke down toward the end of May due to the fact that there were military exercises being conducted in the country of Belize and individuals involved thought it would not be safe to take the plane down there and bring the marijuana into the United States.

Q. Did you have a conversation with Mr. Bell on or about May 25th regarding the importation of marijuana?

A. Yes, I did.

Q. During that conversation what did Mr. Bell state to you?

A. He was very upset due to the fact that he had invested $200,000.00 in this operation and I could not give him a definite date when we could send the DEA undercover pilot and the plane to the country of Belize. They were in a hurry to get the marijuana here due to the fact that the season was about to end down there and there wouldn't be any left.

Q. On or about May 29th did you meet with Mr. Weir at the Orlando Airport regarding this conspiracy?

A. Yes, I did. I met with Mr. Weir. We had gone ahead and made arrangements to send the pilot and the plane to Belize. In fact, what we were going to do was when Mr. Weir showed up with the money to pay the pilot, we were going to arrest him, Mr. Bell and Mr. Kuylen. However, that was cancelled due to the fact that when I got to the airport Weir advised me that there were again military exercises being conducted that particular weekend in Belize and, therefore, we could not send the plane and the pilot.

Q. After that time did there come a time when you and other agents determined that it would not be safe to send a pilot to Belize?

A. Yes. There are only a couple DEA agents stationed in that area of Central America. If we sent the pilot and plane down there we could not recover it safely. Addi-

tionally, we would have to notify the Government of Belize, which would possibly cause some problems and jeopardize the safety of the agents down there.

Q. What decision, if any, did you make regarding the continuation of your investigation into those activities?

A. Due to the fact that all the individuals, Mr. Bell, Mr. Weir and Mr. Kuylen, had already approached us about bringing marijuana into the United States, we changed the course of the investigation in June to where we would offer them a two thousand pound load of marijuana.

Q. Did you in fact meet with Mr. Weir and Mr. Kuylen on or about June 8th regarding that transaction?

A. Yes, I did.

Q. Would you tell the Court what transpired at that meeting?

A. Basically advised them that we had two thousand pounds of marijuana for sale and that the price of the marijuana would be roughly $245.00 per pound. We were requesting that they pay us for a thousand pounds in cash, and we would go ahead and front their group the other thousand pounds of the marijuana.

Mr. Weir stated that he could not speak for himself but would have to get back to Mr. Bell, who was in charge of the operation at that particular time.

Q. During the period June 14th through June 28th, did the individuals involved, that is, Mr. Weir, Mr. Kuylen and Mr. Bell, have any difficulty in raising the amount of money that you discussed?

A. Apparently so. I was instructed when I was undercover with Weir and Kuylen that the main buyer was somewhat in an underground, quote unquote status and could not be reached. Subsequently, further investigation we did flash and give to Mr. Weir—showed him two thousand pounds of marijuana. We gave him a bale containing about forty to forty-five pounds of marijuana to take to his broker, who was Mr. Bell in this case.

Q. Did he in fact taken that bale to Mr. Bell?

A. Yes, he did, took it to his residence.

Q. Was that on or about June 29th?

A. Yes, it was.

Q. And from June 29th until July 8th, did—excuse me, June 29th were Mr. Weir and Mr. Kuylen placed under arrest?

A. Yes, during the process of giving Mr. Weir the bale he discovered our surveillance. He was subsequently arrested the following day, immediately agreed to cooperate, along with Mr. Kuylen. They instructed me that they had taken the bale of marijuana to Mr. Bell's residence, where he would act as a broker and show it to the particular buyer involved in this case.

For the next week Weir made several telephone calls to Mr. Bell, which were recorded by our office. I had several meetings with Mr. Bell. I subsequently was introduced to Mr. Bell in person, at which time Bell explained to me that he had no idea where the buyer was at this particular time but once he did get back in touch with him the deal would go through.

Q. On July 28th did you have occasion to arrest Mr. Bell?

A. On July the 8th.

Q. Excuse me, July 8th.

A. Yes, executed a search warrant at the residence of Mr. Bell, retrieved and recovered the bale of marijuana and arrested Mr. Bell at that time.

Q. Thank you, Mr. Collins.

MR. PURCELL: I have nothing further.

THE COURT: Is there anything anybody wishes to add to that?

MR. MALLETT: No, I believe that recitation is exactly what the Government would offer as proof in this case, that it would support a conviction for conspiracy to import marijuana and a conviction for conspiracy to possess marijuana with the intent to distribute it, and we have no evidence to offer contrary to the proffered testimony by the Government.

THE COURT: All right, sir.

Mr. Bell, I'll accept your conditional plea of guilty to Counts One and Two of the Indictment with the understanding that you will have the right to appeal any Pretrial Orders in this case.

MR. MALLETT: Thank you, Your Honor.

THE COURT: I will order a Pre-sentence Report and set sentencing for April the 16th at 9:00 o'clock.

MR. MALLETT: Thank you, Your Honor.

(The hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA:

COUNTY OF ORANGE:

I, BERNICE M. SCHMITT, being Official Court Reporter, United States District Court, Middle District of Florida, Orlando Division, do hereby certify that I was authorized to and did report in shorthand the above and foregoing proceedings, and that thereafter my shorthand notes were transcribed and reduced to typewriting under my supervision; and that pages numbered 2 through 11, inclusive, contain a true and correct transcription of my shorthand notes taken therein.

Done and signed this 19th day of March, 1984, in the City of Orlando, County of Orange, State of Florida.

/s/ BERNICE M. SCHMITT
Bernice M. Schmitt
Official Court Reporter
United States District Court
Middle District of Florida
Orlando Division

No. 85-1491

Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS RAY BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1491

DENNIS RAY BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court, in accepting his guilty plea, failed to establish that he understood the nature of the charges, as is required by Fed. R. Crim. P. 11(c)(1).

1. On the basis of his plea of guilty, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 952(a) and 963, and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. 1a-19a).

The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. 2a-3a, 8a-11a & n.13). In May 1983, an informant introduced undercover Drug Enforcement Administration (DEA) Agent Stephen Collins to Charles Kuylen and Norman Weir, who were seeking to

smuggle approximately 1500 pounds of marijuana from Belize into the United States. Collins agreed to obtain an aircraft and pilot for use in the smuggling venture. Collins later had several meetings with Kuylen and Weir and a telephone conversation with petitioner in which the problems involved in the operation were discussed. Thereafter, an undercover DEA agent, playing the role of the pilot, showed an airplane to Kuylen and Weir.

Near the end of May, the smuggling operation was delayed because military exercises were being conducted in Belize that made it unsafe to bring in the plane. Petitioner told Collins that he was upset by the delay because he had invested $200,000 in the venture. The mission was rescheduled for May 29, when the agents planned to arrest Weir upon his delivery of money to the pilot at the Orlando Airport. However, military exercises in Belize again forced the postponement of the trip.

On June 8, 1983, Collins offered Kuylen and Weir 2000 pounds of marijuana at a price of $50,000. In response to the offer, Weir stated that he would have to consult petitioner as the person in charge of the operation. Collins later gave Weir a sample bale of marijuana to show petitioner. The day after the bale was delivered to petitioner, DEA agents arrested Kuylen and Weir, who immediately agreed to cooperate in the investigation of petitioner. During the following week Weir and petitioner had several telephone conversations that were recorded by the DEA. Petitioner also told Collins that the deal would go through once petitioner got in touch with the buyer for whom he was working. On July 8, agents executed a search warrant at petitioner's residence, recovered the bale of marijuana, and arrested petitioner.

2. On July 13, 1983, petitioner was charged in a two-count indictment with conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute it.

He was arraigned on July 28 and entered a plea of not guilty. On October 5, 1983, a superseding indictment was returned, and petitioner was again arraigned and pleaded not guilty on October 6.

Petitioner filed a number of pretrial motions in the district court. Thereafter, on February 21, 1984, petitioner entered into a written plea agreement with the government (Pet. App. 20a-22a). The agreement provided that petitioner would enter a conditional plea of guilty to the two marijuana conspiracy charges and that he would preserve his right to appeal the denial of his motion to dismiss the indictment.

At the hearing at which petitioner entered his guilty plea, the district court granted a defense request for a recess to afford petitioner the opportuntiy to discuss the plea agreement with the three attorneys who were representing him (Pet. App. 8a, 25a-26a). Upon reconvening, the district court asked petitioner about his education and occupation and determined that petitioner had attended college and was in the real estate business (*id.* at 8a, 26a). The court then ascertained from petitioner that he was freely and voluntarily entering into the plea agreement after consulting with his attorneys (*id.* at 9a & n.12, 27a). After the government presented Agent Collins to provide a detailed factual basis for the plea (*id.* at 9a-12a n.13, 29a-33a), petitioner's counsel stated (*id.* at 10a-11a, 33a):

> I believe that recitation is exactly what the Government would offer as proof in this case, that it would support a conviction for conspiracy to import marijuana and a conviction for conspiracy to possess marijuana with the intent to distribute it, and we have no evidence to offer contrary to the proffered testimony by the Government.

The district court then accepted petitioner's guilty plea (*id.* at 11a, 33a). Defense counsel raised no objection to the completeness or adequacy of the plea proceeding.

3. On appeal, petitioner contended, inter alia, that the district court violated Fed. R. Crim. P. 11(c)(1) by failing to establish that he understood the nature of the charges to which he was pleading guilty. The court of appeals agreed that "it would have been preferable for the district court to have read the indictment to [petitioner] and thereafter given him the opportunity to ask questions about the indictment" (Pet. App. 13a). However, the court concluded that "in this instance, to permit [petitioner] to replead would be to raise form over substance" (*ibid.*). In so ruling, the court pointed out that petitioner "had the benefit of a written plea agreement which clearly and concisely set forth the charges" (*id.* at 8a (footnote omitted)) and that the charges against petitioner "were 'simple' ones" (*ibid.* (citation omitted)). In addition, the court noted that petitioner had been granted a recess at the Rule 11 hearing to discuss the plea agreement with his attorneys (*ibid.*). Finally, the court observed that petitioner "was a sophisticated and intelligent person who was fully able to understand the nature of the charges against him" (*id.* at 8a-9a (footnote omitted)). For these reasons, the court found, "there is no conceivable way that [petitioner] could have misunderstood the nature of the charges involved" (*id.* at 13a). Thus, "based on the facts of this case, we find no violation of Rule 11" (*ibid.*).

4. The court of appeals correctly rejected petitioner's contention that the district court violated Rule 11 in this case. The decision below does not conflict with any decision of this Court or any other court of appeals, and is limited to the particular facts of this case. Accordingly, further review is not warranted.

Fed. R. Crim. P. 11(c)(1) provides that "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform him of, and determine that he understands, * * * the nature of the charge to which the plea is offered * * *." As explained in the advisory committee note to the 1974 amendment to Rule 11, "[t]he method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant." See also 1 C. Wright, *Federal Practice and Procedure: Criminal* § 173, at 587-588 (2d ed. 1982) (footnotes omitted) ("There is no simple or mechanical rule as to how the court is to determine defendant's understanding of the charge. Some defendants are more sophisticated than others and some charges are more difficult to understand than others".).

In addition, Rule 11(h) states that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." The 1983 advisory committee note states that this provision was designed to ensure that harmless error principles would be applicable to Rule 11 violations. In particular, Rule 11(h) was intended to overturn the rule of per se reversal adopted by the Court in *McCarthy* v. *United States*, 394 U.S. 459 (1969), upon which petitioner relies.

Contrary to petitioner's contention, the district court took steps at the Rule 11 hearing to ensure that petitioner understood the nature of the charges. The court granted a defense request for a recess of the hearing to enable petitioner to confer with his attorneys about the plea agreement. Cf. *Marshall* v. *Lonberger*, 459 U.S. 422, 436 (1983) (citation omitted) (" 'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice

of what he is being asked to admit' "). The court also inquired of petitioner as to his educational and vocational background, which established that he "was a sophisticated and intelligent person who was fully able to understand the nature of the charges against him" (Pet. App. 8a-9a). Moreover, the government offered a detailed statement of the factual basis of the offenses, which further put petitioner on notice of the essential nature of the charges against him. In response, petitioner's counsel agreed that the evidence proffered by the government would support a conviction on the two conspiracy counts to which petitioner was pleading guilty (*id.* at 33a). Petitioner, who was represented by counsel at all stages of the prosecution, never objected that he did not understand the charges to which he was entering a guilty plea; indeed, he did not raise the Rule 11 issue until after he had been sentenced, and even now he does not assert that he actually misunderstood the charges. At least where, as here, "[t]he charges * * * were 'simple' ones" (*id.* at 8a (citation omitted)) and petitioner "had the benefit of a written plea agreement which clearly and concisely set forth the charges" (*ibid.* (footnote omitted)), the guilty plea proceeding was in substantial compliance with Rule 11 and provides no ground for setting aside the guilty plea.*

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*Petitioner's reliance (Pet. 6) on *United States* v. *Corbett*, 742 F.2d 173 (5th Cir. 1984), and *United States* v. *Punch*, 709 F.2d 889 (5th Cir. 1983), is misplaced. In *Corbett*, the court of appeals found that there was "an entire failure" by the district court "to address * * * [the] core concern[]" of Rule 11 that the defendant understand the nature of the charges (742 F.2d at 178); as the court recognized (742 F.2d at 178 n.14), " 'inadequate addresses' of the core concerns that do not rise to the level of 'entire failures' do not require automatic reversal." Similarly, in *Punch*, the court held that the "entire failure" by the district court to address the "core concern" that the defendant understand the nature of the charges requires automatic reversal (709 F.2d at 891); the defect in the plea proceeding in *Punch* was especially significant in light of the defendant's continued assertion that he had not committed the offense charged (709 F.2d at 893, 894-895). In the present case, in contrast to *Corbett* and *Punch*, there was no "entire failure" to address this core concern of Rule 11(c)(1) at the plea hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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